



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE 212 OF 2009**

**IN THE MATTER OF THE ESTATE OF SULEMAN OSALE alias SULMAN OSALE SWAKA  
..... DECEASED**

**A N D**

**SAMUEL AKATSA OSALE ..... APPLICANT**

**V E R S U S**

**JOHN HABIL OSALE ..... RESPONDENT**

**R U L I N G**

The applicant brought this application for orders restraining the respondent from constructing a permanent structure and/or interfering in any manner whatsoever with plot No.10 Khwisero market until the final determination of the Succession Cause and that the respondent be ordered to deposit KShs.257,000/= in court this being the value of the permanent building that was on the above plot but was demolished by the respondent. The application is brought under section 45 1 & 2 of the Succession Act and Rules 49 and 73 of the Probate and Administration Rules.

In his supporting affidavit the applicant states that the property in question belonged to their late father, Suleman Swaka Osale and that during a meeting held on 8/2/2008 the applicant was appointed to be the administrator and this led to the filing of the current succession cause which is still pending in court. The respondent is one of the beneficiaries of the estate.

In his response, the respondent states that there are four beneficiaries of the late Suleman Swaka Osale himself being one of them and states that the building purportedly demolished was burnt by fire and that he was just reconstructing it. The respondent stated that there is another suit vide Butere SRMCC 41 of 2009 pending in court between the two parties.

It is evident from the proceedings herein that there is no administrator appointed by the court to administer the estate of the late Suleman Swaka Osale. On 29<sup>th</sup> April 2009, the applicant filed this succession cause with himself as the petitioner and the respondent is listed as one of the beneficiaries. The applicant states that he was mandated by the family to file the succession cause and has exhibited the minutes of the meeting held on 8/2/2008. It therefore follows that any action touching on the deceased's estate should be approved by the applicant.

Although the respondent states that the building was burnt by fire, it would be unwise for him to reconstruct it yet his share of the estate is not known. I have seen from the schedule of assets contained in the applicant's succession documents and note that the deceased also owned plot No.

**KISA/WAMBULUSHE/571.**

**Section 45** of the Succession Act provides that unless one is expressly authorized by Act or other written law. No person shall, for any purpose, take possession or dispose of, or otherwise intermeddle

with any free property of a deceased person. Upon reconstruction of the property, the respondent does not state whether it will be part of the estate or he will change the estate. I find that effort as unnecessary as there is no proof that the other beneficiaries had failed to reconstruct the property if at all the same had been gutted down by fire.

I do therefore find that unless the respondent is restrained by way of court orders, he might exclude the other beneficiaries of the estate from enjoying their rightful shares. Since there is no proof or evidence that indeed the building was brought down and that its real value was KShs.25,000/=, I feel constrained to grant prayer IV of the applicant's application dated 28/5/2009. Those issues shall be dealt with when confirming the grant.

I therefore order that the respondent, his assignees and/or agents be and are hereby restrained by way of an injunction from constructing a permanent structure and/or interfering in any manner whatsoever with plot No. 10 at Khwisero market until final determination of this cause. There shall be no order as to costs.

*Dated, delivered and signed at Kakamega this 23rd. day of July 2009*

**SAID J. CHITEMBWE**

**J U D G E**